In The

Supreme Court of the United States

October Term, 1975

No. 75-1893

DOMINIC TORTORELLO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Dominic Tortorello respectfully prays that this Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review its order and opinion dated April 1, 1976, whereby it reversed an order of United States District Court Judge Lloyd MacMahon, who had signed an order suppressing evidence. A petition for rehearing was made and was ultimately denied on the 14th day of May, 1976.

OPINION BELOW

The opinion below has not yet been officially reported but is reprinted in the appendix herein.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The United States Court of Appeals for the Second Circuit reversed an order of United States District Court Judge Lloyd MacMahon on April 1, 1976, thereby holding that certain evidence consisting of a number of cases of coffee could be admitted into evidence. Judge MacMahon had ordered that evidence suppressed. A petition for rehearing was timely filed and on the 14th day of May, 1976, the United States Court of Appeals denied the rehearing. A copy of the aforesaid orders and opinion are annexed hereto and made a part hereof.

QUESTIONS PRESENTED

1. Whether, after conceding that Tortorello had standing to challenge an unlawful search and seizure, the Government could properly reverse its stand and contend that they originally erred and that Tortorello actually did not have standing to challenge the search and seizure (Fourth Amendment)?

2. Whether a concession by the Government on a question of law is binding on the court? (*Estate of Sanford v. Commissioner*, 308 U.S. 39, 51; *United States v. Lisk*, 522 F.2d 228, 231 [7 Cir. 1975].)

3. Whether the "automatic standing" rule of *Jones v. United States*, 362 U.S. 257 (1960) has been overruled by virtue of this Court's decision in *Simmons v. United States*, 390 U.S. 377 (1968) as interpreted by the circuit court from this Tribunal's decision in *Brown v. United States*, 411 U.S. 223 (1973)?

In other words, has *Jones v. United States* been overruled?

4. Whether the circuit court's finding that petitioner could and supposedly did consent to the search of a basement over which he had no proprietary interest, is inconsistent with the Government's position that Tortorello lacked standing to object to any search in the first place?

5. Since the federal agents who came to the Hoffman house where the coffee involved herein was seized had more than sufficient time to obtain a search warrant and nevertheless failed to seek one, whether under those circumstances it was a violation of the Fourth and Fifth Amendments to seek the "consent" of Tortorello to search the basement of Hoffman's house following the agents' unlawful exploratory search of his garage?

6. Was it unlawful for the Government to seek the consent of Tortorello to search Hoffman's house for stolen coffee after Hoffman, who admittedly had standing to object to the search, had in fact declined to give his permission or consent to any such searches? Tortorello, according to the Government had no standing whatsoever with respect to those premises.

7. Whether the Government may rely upon the consent of a third person who has no proprietary or other interest in premises to search such premises irrespective of the fact that one of the occupants thereof has objected to the search?

8. Does the automatic standing rule of *Jones v. United States*, 362 U.S. 257, mean that a person has "automatic standing" to grant "consent" or only "automatic standing" to "object" to a search?

9. Whether the United States Attorney's representation that no appeal would be filed, constituted a waiver of appeal?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution and Rule 41(e) of the Federal Rules of Criminal Procedure are involved herein.

ESSENTIAL FACTS

Jurisdictional Question as to Waiver of Appeal by the Government.

Judge Lloyd MacMahon of the United States District Court for the Southern District of New York conducted a suppression hearing in the instant matter following which he issued an order suppressing evidence consisting of approximately 250 cases of allegedly stolen coffee which were found in the basement of a house occupied by Tortorello's mother and father, his sister and brother-in-law, but not himself. This evidence was suppressed not only as to Tortorello but as to a co-defendant named Hoffman. Hoffman has since been severed from the case and apparently he will not be prosecuted. The Government has apparently conceded that the evidence seized at Hoffman's own house which is the same evidence which is the subject of this petition, was seized in violation of Hoffman's rights under the Fourth Amendment of the United States Constitution and accordingly must be suppressed. It is ironic that they do not concede this with respect to Tortorello since he, too, was in the house at the time of the seizure.

With respect to the viability of the appeal itself however we wish to point out that on or about August 28, 1975, the *Government advised Judge MacMahon that no appeal would be taken.* Notwithstanding this fact, approximately thirty days after the order of Judge MacMahon was filed and about thirty-three days after the decision was made, the Government, nevertheless, filed a notice of appeal. It had also sought permission to have

reconsideration and reargument of Judge MacMahon's order of suppression. The Judge, however, citing the rules of the district court, and Rule 45(b) of the Federal Rules of Criminal Procedure declined to extend the Government's time to move for reargument. The district court below apparently felt that the Government had not established "excusable neglect" with respect to its delay in seeking reargument and reconsideration. (See also Rule 9(m) of the General Rules of the Southern District of New York.)

We ask this Court to determine whether or not when the Government announced that it would not appeal, the Government waived its right to appeal (A136).[1]

It is interesting to note that the Government conceded that Tortorello had standing during the search and seizure suppression hearing. The position of the Government was that the petitioner had consented to the search and seizure and accordingly the evidence should be admitted as against both of the then defendants namely Hoffman and Tortorello.

Ironically on the appeal, the Government conceded that Hoffman was entitled to a suppression of the evidence thus seized. It disputed, however, that Tortorello was similarly entitled to it.

In addition the Government changed its entire theory during the appeal by stating that it should not have claimed that Tortorello consented because of the fact that he had no standing in the first place. They maintained that the Government should not have conceded standing at all and accordingly the position taken on the appeal by the Government was that since Tortorello had no standing in the first place, his consent was irrelevant and unnecessary and accordingly the evidence could always be used as against him. Incredibly however, the circuit

1. Numerals in parentheses refer to pages of the appendix filed by the Government with the United States Court of Appeals.

court found that apparently Tortorello did not have standing, but that he did have the right to consent to the search. As a matter of fact it was Tortorello's consent which the circuit court relied upon to find that the evidence seized could be used against him. The paradox of this whole situation is that the self-same evidence is suppressed as against the co-defendant Hoffman but admitted as against Tortorello although they were both present in the same premises at the same time and Hoffman had stated that the only one who could consent was Tortorello. It is difficult to understand how on the one hand Tortorello had no standing and yet on the other hand could be deemed to be capable of consenting.

Pertinent Facts

It is conceded by the Government that federal agents went to the home of the co-appellee, Hoffman. That home was occupied by Hoffman and his wife, the latter being Tortorello's sister, and Tortorello's mother and father. In fact, petitioner Tortorello had himself been a resident of that house up to eight months prior to the search and seizure.

On April 30, 1973, FBI Agents Lester Hay and three others, without search or arrest warrants, went to the premises in question, namely 2258 Hermany Avenue in the Bronx. Hay approached the front door and after a conversation with Hoffman, went to the garage where they examined certain cases of allegedly stolen coffee (A28). Agent Hay asked Hoffman for permission to search the second floor of the house but was refused on the grounds that it would upset his parents-in-law, who were ill (A29).

The federal agents then requested permission to search the basement, but Hoffman refused on the ground that he had no authority to allow such a search (A29, 40-42).

At the agents' insistence, Mrs. Hoffman telephoned her brother, the appellee Dominic Tortorello, who arrived at the house about fifteen minutes thereafter (A97-98).

After advising Tortorello of his rights and receiving a written waiver, Hay and two other agents had a conversation with Tortorello in their automobile about the stolen coffee, including their discovery in the garage (A30, 49-50).

The agents then requested that he permit a search of the basement, after which insistence Tortorello executed a written consent to search (A31-32).

The agents were taken to the basement by Tortorello and discovered the 250 cases of stolen coffee, which are the subject of the indictment.

It is obvious that on the one hand at the hearing, the Government was relying upon the consent of Tortorello to justify the search of the basement. Then for the first time on the appeal to the circuit they took the position that Tortorello had no right to grant them any consent because he had no standing to object in the first place. This was not the position which was taken during the hearing in the district court below. It is obvious that the Government was seeking to adduce evidence against both Hoffman and Tortorello, and not Tortorello alone, It is therefore clear that they were not raising any question of jurisdiction or standing so far as Tortorello was concerned, vis-a-vis the search.

It is submitted that the Government for the first time raised something new on the appeal. In *Wiborg v. United States,* 163 U.S. 632, and *United States v. Atkinson,* 297 U.S. 157, this Court held that ordinarily matters raised for the first time on appeal will not be reviewable unless they constitute plain error. We maintain that the Government cannot raise "plain error" to excuse their own neglect or mistake. It is further submitted that

the plain error rule was obviously designed for the aid of defendants since ordinarily the Government cannot appeal. It is only within a very limited area that the Government has a right of any appeal and the plain error rule we maintain (Rule 52(b) of the Federal Rules of Criminal Procedure), do not apply to Government appeals. Accordingly the concession made by the Government of standing on the part of Tortorello should have been sustained in the court below. If Tortorello had standing then the opinion of the United States Court of Appeals below was incorrect since they relied upon his consent. The only person who really could consent was Hoffman since Hoffman was a resident of the house in question. Tortorello was admittedly not a resident of that house and he could not consent to a search of those premises. Once Hoffman objected to the search, there should have been no further effort to obtain any evidence through a search without obtaining a search warrant. The Government made no effort to obtain a search warrant in this case.

The question here which is raised is whether a complete stranger or at least a person without any proprietary interest in premises can "consent" to a search of those premises?

It is submitted that while the opinion of Judge MacMahon on November 14, 1975 may not be reviewed for the purpose of considering the reargument, it is nevertheless instructive as to the findings of facts and conclusions of law that the Judge made with respect to his original decision of August 29, 1975. Judge MacMahon had not expatiated in that August 29th decision since the Government had assured him that it would not appeal. Thus, the finding and conclusion of Judge MacMahon with respect to the search is contained on page 10 of his November 14th opinion wherein he says, *inter alia* (A144):

> "There were no exigent circumstances here. The two agents who went to the rear of the Hermany Avenue house were mere trespassers. . . . The agents had sufficient information to obtain a search warrant at least four or five days before they went to the Hermany Avenue house on April 30th, 1973. Indeed, there was no attempt whatsoever to assert at the hearing a valid reason for the failure of the F.B.I. to obtain a search warrant. Therefore this search was unreasonable."

The trial court below then turned to the question of "standing." The district judge opined further on page 11 of his November 14th decision (A145):

> "We specifically requested the parties to address this point [standing] in a post-hearing memorandum. *The government's memorandum conceded that both defendants had standing under the 'automatic standing' rule* of *Jones v. United States,* 362 U.S. 257 (1960), that is, in a criminal prosecution in which possession is an essential element of the crime, a defendant automatically has standing to raise Fourth Amendment objections to seized evidence." (Emphasis ours.)

In its decision of November 14th, 1975, the district court declares that it was incorrect with respect to its determination that Tortorello had standing when it rendered its decision on August 29th.

We must bear in mind, however, that this aspect of the case is not before this Tribunal. The court was considering a motion for reargument where the Government was shifting its position. Prior to the motion for reargument the Government had taken the position that there was no issue of standing since the district court found that the Government had conceded that both Tortorello and Hoffman in fact had standing. It was only after

the motion for reargument was filed some 30 days after the district court's original decision that the Government suddenly came to the conclusion that it should not have made that concession and that in any event Tortorello did not have standing.

The Government's point of view had shifted again. Not only did it take an appeal from Judge MacMahon's determination suppressing evidence against both Hoffman and Tortorello, but in the circuit court had abandoned its claim with respect to Hoffman altogether.

Thus, the Government seems to be vacillating in a very undecisive manner.

We have already adverted to the fact that the petitioner may not hide behind the smoke screen that the Solicitor General did not make a determination that no appeal should be taken because his consent or approval was not sought until about 30 days after the decision not to appeal. The trial court noted from vast experience that such slips are the rule rather than the exception.

Moreover, under the case of *Santobello v. New York,* 404 U.S. 257 (a case argued by the writer of this brief in the Supreme Court of the United States), the Supreme Court held that in a prosecutor's office the "left hand must know what the right hand is doing." It is no excuse, therefore, that the United States Attorney's office declared that no appeal would be taken and now seeks to excuse that waiver by asserting that it had no right to make such a statement. If that is the case, then all cases should be handled directly by the Solicitor General and not by the United States Attorney's office altogether since apparently this would mean that when one deals with the U.S. Attorney's office in the Southern District, they are not dealing in any binding manner at all, but must await word from the Solicitor General in Washington.

We maintain that between the United States Attorney's office and the Solicitor General, there may have been some slip-up. If so, it is unfortunate, but, according to Judge MacMahon who has vast experience in this area and was a former Chief of the Criminal Division of the United States Attorney's office, such mistakes are typical. No defendant, however, and no court, should be bound to recognize such mistakes as jurisdictionally sufficient to warrant granting of either reconsideration or rendering determinations of United States Attorney's office as meaningless.

Once the Government, through the United States Attorney, gives its representation, that should be deemed binding irrespective of whether or not a slip-up has occurred.

In any event, we do not concede the reasoning of Judge MacMahon or the Government to be valid with respect to the issue of standing under any circumstances.

Under *Jones v. United States,* 362 U.S. 257 (1960) and *McDonald v. United States,* 335 U.S. 451 (1948), the Supreme Court has clearly indicated that standing exists where a person is on the premises of any edifice wherein the search and seizure occurs.

In the case at bar it is manifest that at the agents' behest, Tortorello was brought to the Hermany Avenue home, and it was he who was looked to, to give consent to enter the basement. It would appear that the occupants of that house had certainly ceded to the petitioner Tortorello the proprietary interest necessary to grant consent or to refuse consent.

We maintain that in view of the close relationship by affinity and consanguinity with the occupants of the Hermany Avenue home, namely the mother and father of Tortorello, as well as his sister and brother-in-law, would grant him much more than the ordinary nexus with such a home.

The co-defendant, Hoffman, declared that he had no authority to grant consent to search the basement. The other occupant of that apartment, namely Mrs. Hoffman, who is Tortorello's sister, at the behest of the agent, was told to call Tortorello, since apparently it was he who would have authority to grant such consent. We maintain that the consent, however, which was granted by Tortorello, was not the true type of voluntary consent that one should expect, but rather was in response to lawful authority.

See *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973).

See also, *Brown v. Illinois,* 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975).

We must bear in mind that Tortorello was requested to come over by Federal Bureau of Investigation agents and was taken into their car and was interrogated. We must therefore presume, as we have a right to, that he was not in a position where he could just walk away.[2]

The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest *(Davis v. Mississippi,* 394 U.S. 721 (1969); *Terry v. Ohio,* 392 U.S. 1, 16-19; and *United States v. Brignoni-Ponce,* 45 L. Ed. 2d 607 (1975)).

"Whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person," *Terry v. Ohio, supra,* at 16, — and the Fourth Amendment requires that the seizure be "reasonable."

We therefore maintain that under the circumstances described in the record herein, Tortorello was not merely some guest but was in the custody of the FBI agents. He was brought

2. Thus, the argument of the Government that Tortorello was not in "possession" of the coffee is not persuasive, since he was actually on the premises searched at the instance of the Government. *Brown v. United States,* 411 U.S. 273, 229 is therefore not applicable.

over to the Hermany Avenue address and then interrogated, not with a view toward passing the time of the day, but clearly with a view toward incriminating him with respect to the stolen coffee.

ARGUMENT

I.

The court below was in error in its decision of reversal since it assumed a state of facts which is untenable. The court found voluntary consent by Tortorello despite the Government's contrary position and despite the inconsistency of the record which belies consent.

At Slip Opinion 2887 and 2888 of the United States Court of Appeals' affirmance in the case herein, the court below declares that since Tortorello accompanied the agents on the search of the basement but was not present when the garage of the same premises was also searched, that his consent was sufficient to validate the search of the basement. The Government however had taken the position at the appeal that consent was not meaningfully given because Tortorello had no right to consent in the first place because he had no standing.

It is obvious therefore that the United States Court of Appeals predicated their affirmance upon the "consent" of Tortorello to a search over premises where he had no standing to object in the first place according to the Government. Moreover on the appeal the Government did not predicate its request for affirmance upon "consent" since it took the position that no consent was even necessary.

The determination of the court below therefore is extremely difficult to understand under these circumstances.

We submit that this Court should resolve the question of whether or not Tortorello had standing and also whether or not

he had the right to consent to a search altogether since the position of the Government was that he had no proprietary or other interest in these premises. Did he consent is also posed for resolution.

The question is presented whether or not the Government can ever rely upon the consent of a person who has no interest in a premises to search. The *Jones* case, *supra,* does not mean as we under it that Jones could have consented to a search. As we understand *Jones* the rule of "automatic standing" is that a person on the premises which are being searched has "automatic standing" to object. He does not necessarily have automatic standing to consent.

II.

The evidence herein should have been suppressed in any event since it was tainted and the "fruits of a poisonous tree." The petitioner had been arrested for being in possession of stolen coffee five days earlier by state authorities and it is manifest that the federal agents conducted their trespassory and warrantless search of the Hermany Avenue home as a result of the knowledge which must have been imparted to them by the state authorities. In any event, the agents had more than enough time to obtain a search warrant.

All searches without a warrant are presumptively violative of the Fourth Amendment unless they come within a recognized exception to the rule requiring such warrants. The only such exceptions would involve a consent search or a search incident to a lawful arrest *(Coolidge v. New Hampshire,* 403 U.S. 443 (1971)).

In the case at bar, during the hearing itself and the legal arguments made in connection therewith, the Government's position was that Tortorello gave a valid consent to the search. We have already analyzed our reasons for maintaining that the

consent was really submission to lawful authority and was not the product of a free will. Tortorello was obviously already under arrest by state authorities and had been summoned to the Hermany Avenue address at the behest of federal agents who proceeded to interrogate him in a car.

Additionally, however, no lawful arrest had yet taken place so there was no search incident to a lawful arrest. Assuming, however, that a lawful arrest had occurred, it would certainly not warrant searching the basement since that would have been inconsistent with the rules permitting a search incident to an arrest which must be in an area in the immediate vicinity of the person arrested and not at some remote point *(Chimel v. California,* 395 U.S. 752).

We must bear in mind further that this was not a search conducted in the course of "hot pursuit" *(Warden v. Hayden,* 387 U.S. 294); nor was it a search conducted in an emergency situation or exceptional circumstances *(Terry v. Ohio, supra; Schmerber v. California,* 384 U.S. 757; *Johnson v. United States,* 333 U.S. 10; or *McDonald v. United States,* 335 U.S. 451).

Moreover, this was not a search in an open non-private area *(Hester v. United States,* 265 U.S. 57); nor did it involve abandoned property *(Abel v. United States,* 362 U.S. 217).

Since admittedly federal agents conducted the search, we do not have an exception relating to private persons *(Burdau v. McDowell,* 256 U.S. 465; *Sackler v. Sackler,* 15 N.Y. 2d 40). The district court should have also suppressed on the "fruit's" doctrine.

In short, there were no exceptions under which the federal agents could proceed.

The Government having taken the position of the district court on the original hearing, that Tortorello had standing since

they were relying upon his consent to authorize the search, have not shifted not only from that position by claiming that he had no standing, but also take the position now that his co-defendant Hoffman, should have secured a proper suppression of evidence.

The Government really is arguing that it may conduct "exploratory searches." In other words, it could deliberately conduct a trespassory search of Hoffman's abode and use any evidence found against a person who is not a resident there, irrespective of the fact that the search was admittedly invalid. Without Tortorello's arrest, no one would have permitted the agents to the basement.

We must bear in mind that the entire hearing in the district court predicated itself upon the fact and argument that the FBI agents had acted properly within the purview of a consent search. The Government, however, had their cake and ate it too. They were permitted to shift their position and state that the facts adduced were no longer valid.

Having failed in their attempt to secure a reargument, they should have been precluded from raising issues which were presented during the reargument. They should have been concluded by the factual determinations made by the district court with respect to the only valid motion which was before the circuit court. That includes the decision thereon which culminated in the August 29th opinion of Judge MacMahon, which was filed on September 3rd.

The FBI had almost one week within which to secure a search warrant, and failed to do so. They did not even have an excuse for not having made such an attempt. The activities in obtaining the coffee in the basement of the Hermany Avenue house were clearly violative of every concept of fairness and certainly a gross affront to the Fourth Amendment. The seizure of the coffee in the basement was the product of the "fruits of a

poisonous tree." *(Nardone v. United States,* 308 U.S. 338; *Silverthorne Lumber Company v. United States,* 251 U.S. 385; and *Brown v. Illinois, supra).*

See too, *Katz v. United States,* 389 U.S. 347 and *United States v. Marotta,* 326 F. Supp. 377 (S.D.N.Y. 1971).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

s/ Irving Anolik
s/ Joseph P. Carrozza
Attorneys for Petitioner

IRVING ANOLIK
Of Counsel

APPENDIX

ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of May, one thousand nine hundred and seventy-six.

Present:

HON. PAUL R. HAYS

HON. WILLIAM H. MULLIGAN

HON. MURRAY I. GURFEIN

Circuit Judges.

United States of America,

Plaintiff-Appellant,

v.

Frank Hoffman, Dominic Tortorello,

Defendants-Appellees.

75-1376

A petition for a rehearing having been filed herein by counsel for the appellee Dominic Tortorello,

Order Denying Rehearing

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

ORDER OF AFFIRMANCE

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 1st day of April, one thousand nine hundred and seventy-six.

Present:

Hon. Paul Hays, Circuit Judge

Hon. William H. Mulligan, Circuit Judge

Hon. Murray I. Gurfein, District Judge.

Docket No. 75-1376

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

DOMINIC TORTORELLO,

Defendant-Appellant.

Order of Affirmance

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed.

s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

OPINION OF THE COURT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 775—September Term, 1975.

(Argued January 30, 1976 Decided April 1, 1976.)

Docket No. 75-1376

UNITED STATES OF AMERICA,

Appellant,

—against—

DOMINIC TORTORELLO,

Defendant-Appellee.

Before:

HAYS, MULLIGAN and GURFEIN,

Circuit Judges.

Appeal by the United States from an order of the United States District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge,* suppressing certain stolen coffee as well as certain statements of the appellant Dominic Tortorello as evidence against him at trial on ground that such evidence was the product of illegal searches.

Reversed on grounds that appellant lacked standing to challenge one search, and that he consented to a second search.

RONALD L. GARNETT, Assistant United States Attorney, New York, N.Y. (Thomas J. Cahill,

United States Attorney, and James A. Moss and John D. Gordan, III, Assistant United States Attorneys, of counsel), *for Appellant.*

IRVING ANOLIK, Bronx, N.Y. (Joseph P. Carrozza, Bronx, N.Y. of counsel), *for Defendant-Appellee.*

GURFEIN, *Circuit Judge:*

The United States appeals, pursuant to 18 U.S.C. § 3731, from an order of the United States District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge,* suppressing certain stolen coffee as well as certain statements of the defendant Dominic Tortorello ("Tortorello") as evidence against him at trial.

On April 25, 1973, Frank Hoffman ("Hoffman") and Tortorello, while driving a van containing some 50 boxes of allegedly stolen coffee, were apprehended in Brooklyn by New York City police officers. The next day both suspects gave statements in the Brooklyn House of Detention to FBI agent Lester Hay after being informed of their rights and executing waiver forms. They were subsequently released.

On the morning of April 30, 1973, Hay and three other agents, without search or arrest warrants, went to 2258 Hermany Avenue in the Bronx, where Hoffman lived on the first floor with his family. Hoffman's parents-in-law, who are also parents of Tortorello, resided on the second floor. At the back of the two-family house is a detached three-car garage connected to the street by a driveway. The house has a basement. Although Tortorello formerly lived in this house, he moved out in August 1972, when he got married.

As Agent Hay approached the front door, other agents walked down the driveway to the back of the house and looked into the garage through a window. They saw some fifty boxes of coffee and told Hay of their discovery. Hay met with Hoffman and advised him that the agents had seen coffee in the garage. The agents obtained permission from Hoffman to conduct a search of his residence on the first floor of the house. The search turned up nothing. The agents and Hoffman then went to the garage, and, with Hoffman's consent, the agents entered and examined the cartons of coffee. Hay, thereupon, asked Hoffman for permission to search the second floor of the house, but Hoffman refused, saying that it would upset his parents-in-law who were ill. The agents also asked Hoffman for his consent to search the basement. Hoffman refused to consent on the ground that he had no authority to allow such a search. The agents then requested Mrs. Hoffman to telephone her brother, defendant Tortorello, to come over. Tortorello arrived at the house some fifteen minutes later. The agents asked Tortorello to come into their car. There they advised him of his constitutional rights and asked his permission to search the basement. The agents informed Tortorello that they had seen the coffee in the garage, and that they felt they could get a search warrant for the basement if he refused to consent to the search. Tortorello then signed a written consent to the search of the basement. The agents were taken to the basement by Tortorello where they found 250 boxes of coffee.

On July 23, 1975, defendants Hoffman and Tortorello were indicted. The indictment charged that on April 23, 1973, they unlawfully received, concealed and stored 250 boxes of coffee (presumably the coffee which was found in the basement during the April 30, 1973 search), moving as part of an interstate shipment, knowing the same to have been stolen, in violation of 18 U.S.C. § 2315.

On August 14, 1975, Hoffman and Tortorello moved to suppress: (a) certain statements made by them; (b) the 50 boxes of coffee found in the van they were driving when they were stopped by the New York City police on April 25, 1973; (c) the 50 boxes of coffee found on April 30, 1973 in the garage adjacent to the Hermany Avenue house; and (d) the additional 250 boxes of coffee seized the same day by the agents in the basement of the house.

An evidentiary hearing on the motion was held on August 26, 1975. On August 27, Judge MacMahon announced from the bench that the search of the garage and the basement at 2258 Hermany Avenue had been illegal and that the coffee so discovered and any statements taken then or thereafter would be suppressed. An order to this effect was filed on September 3, 1975. The Government conceded, at that time, that since Tortorello was charged with a possessory crime, he had standing, under the "automatic standing" rule of *Jones* v. *United States*, 362 U.S. 257 (1960), to move to suppress any evidence seized in violation of the Constitution. Judge MacMahon, quite understandably, accepted this concession at the time as a correct statement of the governing law.

On October 2, 1975, the Government moved to reargue the suppression motion as to Tortorello on the ground that he lacked standing to complain of the search of the garage and that it was the illegality of the garage search that had impelled the District Court to suppress the coffee later found in the basement, together with Tortorello's later statements. In a written opinion, on November 14, 1975, Judge MacMahon indicated that he now agreed with the Government's present position that Tortorello did not have standing to challenge the search of the garage and that, with respect to the coffee found in the search of the basement, Tortorello had voluntarily consented to that

search. He found, however, that the Government's motion for reargument was not timely made.

The appeal is from Judge MacMahon's *original* order of September 3, 1975, which granted defendants' motion to suppress, and with which Judge MacMahon later disagreed in his careful opinion of November 14, written for the benefit of this court.[1]

We agree with Judge MacMahon's later opinion that appellee Tortorello lacked standing to challenge the search of the garage and that he had voluntarily consented to the search of the basement. Accordingly, we reverse the original suppression order of the District Court.

I

Appellee initially contends that the Government may not argue before the Court of Appeals that Tortorello lacked standing because it had agreed in the District Court that appellee did have standing to challenge the legality of the searches. We disagree. The only "concession" on Tortorello's standing was made in the context of rebutting an argument that Tortorello's consent was unavailing because he had no authority to consent to the search of the basement. In any event, whether Tortorello has standing to challenge the legality of the searches is a question of law. A concession by the Government on a question of law is not binding on the court. See *United States* v. *Lisk*, 522 F.2d 228, 231 n.8 (7 Cir. 1975) (Stevens, *J.*). See also *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 51 (1939). The Government is free to argue in this court that appellee has no standing to suppress the coffee found in the garage.

1 On January 13, 1976, we dismissed the appeal as to Hoffman on the Government's motion. Only the appeal as to Tortorello is now before us.

II

The law regarding standing to suppress materials derived from an illegal search in the case of an offense where possession is an essential element has been evolving in recent years. *Jones* v. *United States*, 362 U.S. 257 (1960), held that a person charged with possession of property that had been seized illegally had "automatic standing," as a "person aggrieved" within Fed. R. Crim. P. 41(e), to challenge its admissibility, even though the defendant testified that the property seized was not his and that the place of arrest was not his home.[2] The court fixed upon an "automatic" standing rule, in such cases, to avert the unfairness of the dilemma to which the defendant would otherwise be put, that to achieve standing he must claim possession, even though his admission of possession would deal him a fatal blow at trial. Judge Learned Hand in *Connolly* v. *Medalie*, 58 F.2d 629, 630 (2 Cir. 1932), had recognized the dilemma but held, nevertheless, that a defendant could not "secure the remedies of a possessor, and avoid the perils of the part." *Jones* avoided Judge Hand's dilemma by

2 Justice Frankfurter in *Jones* said that "[t]he issue of petitioner's standing is to be decided with reference to Rule 41(e) of the Federal Rules of Criminal Procedure." 362 U.S. at 260. At that time Rule 41(e) provided that "[a] person aggrieved by an unlawful search and seizure" may move for return of the property and to suppress for use as evidence anything illegally obtained. *Jones* reasoned, relying on the language of the rule, that a "person aggrieved" included one who may have owned the seized property but who could not assert his rights because he was charged with the very possession he must prove to establish his standing.

Rule 41 was amended in 1972, and the amended rule no longer specifically states that only an "aggrieved person" may move to suppress evidence. However, the Court has noted that the old Rule 41 merely "conforms to the general standard and is no broader than the constitutional rule." *Alderman* v. *United States*, 394 U.S. 165, 173 n.6 (1969). We conclude, therefore, that despite Justice Frankfurter's emphasis on the language of former Rule 41(e), it was not the key to his decision in *Jones*.

holding that standing will be presumed if the defendant would have to prove his guilt of the crime in order to establish his standing. Although the *Jones* Court reached this result in possession cases, it indicated that in cases not involving an offense of "possession" the defendant must establish "that he himself was the victim of an invasion of privacy." 362 U.S. at 261.

In 1968, the Court prohibited the prosecution from using the testimony of a defendant on the suppression hearing at his subsequent trial. *Simmons* v. *United States,* 390 U.S. 377 (1968). While *Simmons* did not itself involve a "possessory" crime, its exclusionary rule tended to extricate the defendant from the dilemma which had concerned the *Jones* Court, as well as this court, in the "possession" cases.

The Court, thereafter, in *Brown* v. *United States,* 411 U.S. 223 (1973), recognized that the *Jones* dilemma had been diluted by the *Simmons* exclusionary rule.

When arrested with a truck full of stolen goods, the appellants in *Brown* confessed that they had stolen *other* goods two months earlier, and had sold them to one Knuckles. The police searched Knuckles' store on a defective warrant, while the appellants were not present but in custody, and found the goods which had been stolen two months earlier. Knuckles moved to suppress the evidence against him, successfully, but the District Court denied appellants' motion for lack of standing, and the stolen merchandise seized from Knuckles' store was later received in evidence.

The offense charged in *Brown* was conspiracy to transport as well as actual transportation of stolen goods in interstate commerce in violation of 18 U.S.C. § 2314. The indictment alleged that the conspiracy had ended the day *before* the illegal search of Knuckles' store. Since "[t]he stolen goods seized had been transported and 'sold' by

petitioners to Knuckles approximately two months before the challenged search," the Court concluded that "[t]he vice of allowing the Government to allege possession as part of the crime charged, and yet deny that there was possession sufficient for standing purposes, is not present," and that "[t]he Government cannot be accused of taking 'advantage of contradictory positions.' *Jones* v. *United States, supra,* at 263." 411 U.S. at 229. The Court emphasized that "we do not decide that this vice of prosecutorial self-contradiction warrants the continued survival of *Jones'* 'automatic' standing now that our decision in *Simmons* has removed the danger of coerced self-incrimination. We simply see no reason to afford such 'automatic' standing where, as here, there was no risk to a defendant of either self-incrimination or prosecutorial self-contradiction." *Id.*

The Court accordingly found that there was no standing to contest a search and seizure where, as there, the defendants: "(a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." *Id.*

In our case, Tortorello did not allege any interest in the garage and was not present at the time of the search of the garage and the seizure of the coffee within it. Nor did he claim any proprietary or possessory interest in the coffee.

Furthermore, the indictment does not allege that the coffee in the garage was criminally received by Tortorello. The coffee seized in the garage amounted to only 50 boxes, while the indictment charges the defendants with receiving 250 boxes, the very amount found in the *basement*. Indeed, the Government specifically concedes in its brief that "the

indictment does not charge . . . the 50 cases found in the garage." Since the Government has not charged Tortorello with possession of the coffee found in the garage at the time of the illegal search, it has not involved itself in any seeming self-contradiction.[3] In the case of Tortorello, with respect to the garage seizure, we think, therefore, that our case meets all of the criteria set forth in *Brown*.[4]

We follow the "established principle" laid down in *Alderman* v. *United States*, 394 U.S. 165, 171-72 (1969), that "suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." Accordingly, we find that Tortorello did not have standing to challenge the search of the garage.[5]

III

The search of the basement presents a different problem. It is true that Tortorello lacked a possessory interest in the basement, just as he lacked an interest in the garage. However, Tortorello accompanied the agents when they

3 We do not find controlling, however, the fact that the indictment charged the defendant with receiving, concealing and storing the stolen coffee "[o]n or about April 23, 1973," while the search took place on April 30th, seven days later. The dates set forth in the indictment seem to be approximations, since there appears to be no evidence which directly shows that defendants possessed the coffee on April 23rd.

4 We therefore have no reason to determine whether the "automatic standing" rule of *Jones* still has any application, in light of *Simmons* and *Brown*.

5 Appellant also argues, relying on *McDonald* v. *United States*, 335 U.S. 451 (1948), that he should have standing to challenge the search of the garage by reason of the fact that his co-defendant, Hoffman, concededly does have standing. This argument is without merit, since the Supreme Court has rejected a reading of *McDonald* which would automatically extend standing to a co-defendant. *Alderman* v. *United States*, *supra*, 394 U.S. at 173 n.7.

conducted the search of the basement. The Government also requested Tortorello to consent to the basement search. It would be anomalous for us to permit the Government to support the legality of its search on the basis of consent while denying that the person upon whose consent the legitimacy of the search depends has standing to object to it. We find, therefore, that Tortorello did have standing to challenge the legality of the basement search.

We conclude, however, that Tortorello voluntarily consented to the search of the basement, as Judge MacMahon found after the hearing.[6] Whether he was in fact authorized to give consent for the search of the basement or not, he is bound by his consent. He signed a written authorization which gave the FBI agents the right to conduct the search. Though he now contends that he was coerced to agree, coercion is not established solely by the circumstance that the statement was signed while Tortorello was sitting in a car with three FBI agents. He was not under detention through an illegal arrest. Compare *Brown* v. *Illinois*, 422 U.S. 590 (1975). As the Supreme Court recently noted, "the fact of custody alone has never been enough in itself to demonstrate a coerced . . . consent to search." *United States* v. *Watson*, 44 U.S.L.W. 4112, 4116 (U.S. Jan. 26, 1976). See also *United States* v. *Fields*, 458 F.2d 1194, 1198 (3 Cir. 1972), *cert. denied*, 412 U.S. 927 (1973). Tortorello did not testify that the agents pressured him into signing the consent form. He testified that the agents simply told him that they had found coffee in the garage and that they could get a warrant to search the basement if he did not

6 Appellee conceded in his brief in this court that "while the opinion of Judge MacMahon on November 14, 1975 may not be reviewed for the purpose of considering the reargument, it is nevertheless instructive as to the Findings of Facts and Conclusions of Law that the Judge made with respect to his original decision of August 29, 1975." In the posture of the case, we assume that upon a remand the Judge would affirm the findings he made in the November 14 opinion.

consent. Consent is a question of fact to be determined from all the circumstances. See *United States* v. *Miley*, 513 F.2d 1191, 1201-02 (2 Cir.), *cert. denied*, 96 S. Ct. 74 (1975). "In this case, there is no evidence of any inherently coercive tactics—either from the nature of the police questioning or the environment in which it took place. Indeed, since consent searches will normally occur on a person's own familiar territory, the specter of incommunicado police interrogation in some remote station house is simply inapposite." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 247 (1973).

Nor was Tortorello's consent tainted by the circumstance that, before he consented, he was informed by the FBI agents that they had seen the coffee in the garage. The warrantless search of the garage was an unreasonable search, as we have seen, and the procurement of a "voluntary" consent to search based upon a prior illegal search may taint the consent. See, *e.g.*, *United States* v. *Hearn*, 496 F.2d 236, 241-44 (6 Cir.), *cert. denied*, 419 U.S. 1048 (1974); *Holloway* v. *Wolff*, 482 F.2d 110, 115 (8 Cir. 1973). This principle might have been applicable here, as well, if Tortorello's own right of privacy had been invaded in the garage search. Since we have determined, however, that Tortorello had no standing to contest the legality of the garage search, the information obtained from that search was not illegally obtained *as far as Tortorello is concerned*. In *Wong Sun* v. *United States*, 371 U.S. 471, 491-92 (1963), the Court held that narcotics illegally obtained from Yee could nevertheless be used as evidence against Wong Sun, since "[t]he seizure of this heroin invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at his trial." It follows that the unlawful search of the garage did not invalidate Tortorello's consent of the search of the basement.

The order of the District Court filed on September 3, 1975, is reversed insofar as it suppresses, with respect to appellant Tortorello, evidence obtained from the searches at 2258 Hermany Avenue on April 30, 1973, and statements made by Tortorello in connection with these searches.

No. 75-1893

In the Supreme Court of the United States

OCTOBER TERM, 1976

DOMINIC TORTORELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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DOMINIC TORTORELLO, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the admissibility against him of certain evidence that he claims was illegally seized.

Petitioner and a co-defendant were indicted in the United States District Court for the Southern District of New York on the charge that they unlawfully received, concealed, and stored 250 boxes of coffee moving as part of an interstate shipment, knowing them to have been stolen, in violation of 18 U.S.C. 2315. On petitioner's motion, the district court entered a pre-trial order suppressing evidence concerning the coffee on the ground that it was discovered as a result of two unlawful searches. The district court also suppressed certain statements made by petitioner at the time of the searches.

The government appealed. The court of appeals, in a thorough opinion, reversed the suppression order, holding that petitioner lacked standing to challenge the lawfulness of one of the searches and that he validly consented to the other (Pet. App. 4a-15a).[1]

Petitioner presents no fewer than nine questions relating to the court of appeals' interlocutory judgment (Pet. 2-3). Even if the case were ripe for review by writ of certiorari at this stage—which we doubt (see, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327)—none of the questions presented would warrant further review.

1. Petitioner argues that the court of appeals should have considered itself bound by the government's "concession" (Pet. 10) in the district court that petitioner had standing to challenge one of the searches. It is settled, however, that a court is "not bound to accept, as controlling, stipulations as to questions of law." *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 51.

2. Nor was the government's statutory right to appeal "waived" (Pet. 5) by its initial oral advice to the district court that no appeal was contemplated. The government, no less than private litigants, is entitled to change its plans. The notice of appeal was timely filed, and petitioner points to no prejudice that he suffered as a consequence of the government's initial advice to the court.

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[1]The judgment of the court of appeals (Pet. App. 2a-3a) was entered on April 1, 1976, and a petition for rehearing was denied on May 14, 1976 (Pet. App. 1a-2a). On June 15, 1976, Mr. Justice Marshall denied, for failure to comply with Rule 34(2) of this Court's Rules, an application for an extension of time within which to file a petition for a writ of certiorari. The petition was not filed until June 29, 1976, and is therefore out of time under Rule 22(2).

3. On the merits, petitioner contends that he had "automatic standing" under *Jones* v. *United States*, 362 U.S. 257, to challenge the lawfulness of the search of a garage on his parents' premises. But, as the court of appeals correctly held, the automatic standing rule, even assuming its continued vitality, has no application here because "the Government has not charged [petitioner] with possession of the coffee found in the garage at the time of the illegal search" (Pet. App. 12a). See *Brown* v. *United States*, 411 U.S. 223, 229.

4. Petitioner argues that his consent to a search of the basement of his parents' house—a search that revealed the 250 boxes of coffee that he was charged with having unlawfully received—was invalid because (a) he had no right to consent to the search, (b) his consent was tainted by the prior unlawful search of the garage, and (c) the law enforcement agents had time to obtain a warrant.

First, whether or not petitioner's consent to the search would have been conclusive with respect to the rights of other persons, "he is bound by his [own] consent" (Pet. App. 13a). He thereby waived whatever rights *he* had to object to the search.

Second, although petitioner gave his consent to a search of the basement after the agents informed him that they had seen coffee in the garage, the validity of that consent is not tainted by the unlawfulness of the search of the garage. As the court of appeals correctly held, since petitioner "had no standing to contest the lawfulness of the garage search, the information obtained from that search was not illegally obtained *as far as* [*petitioner*] *is concerned.* * * * It follows that the unlawful search of the garage did not invalidate [petitioner's] consent [to] the search of the basement" (Pet. App. 14a; emphasis in original).

Third, the availability of a warrant is wholly immaterial if, as here, a search is conducted with valid consent.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1976.

DOJ-1976-09